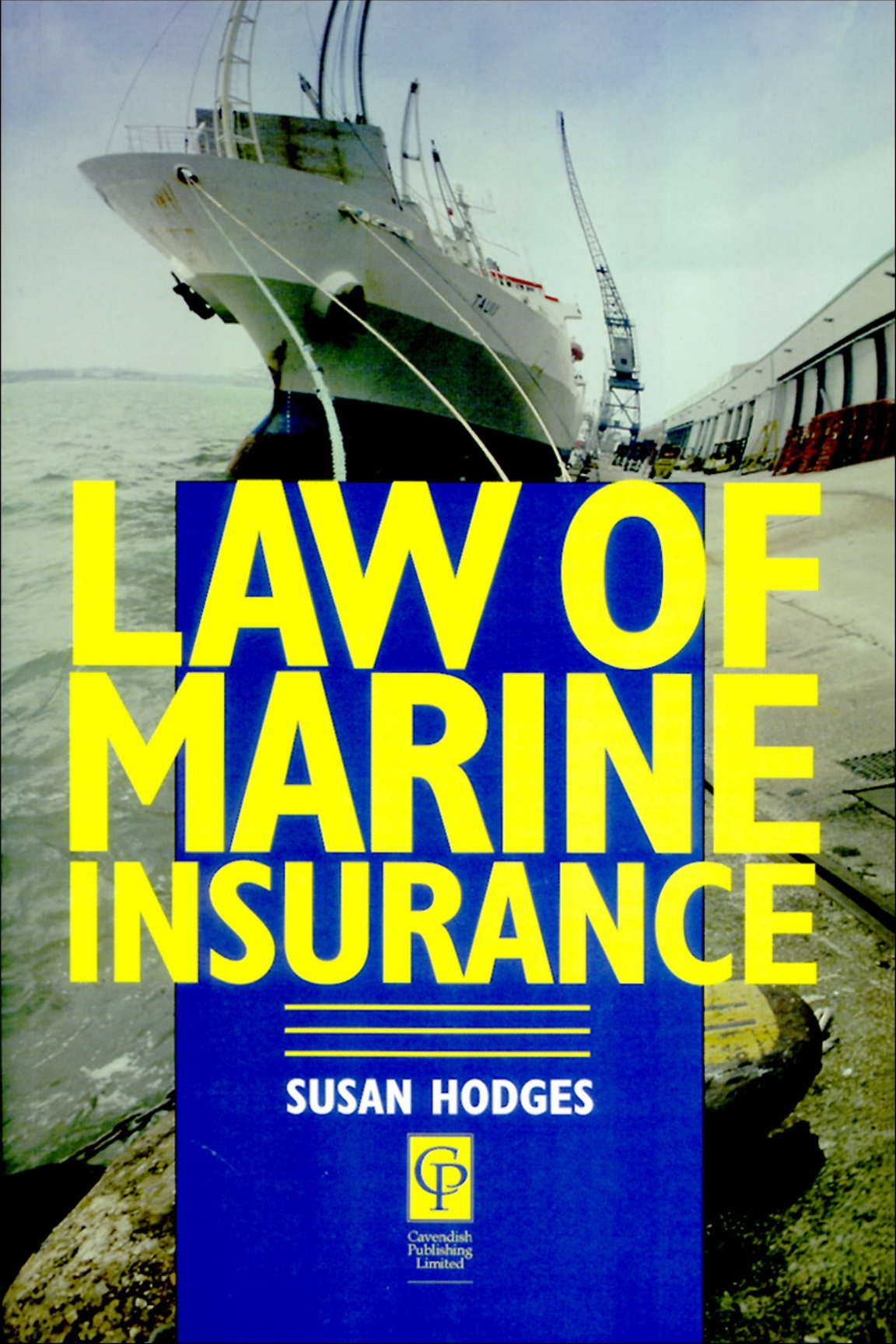

LAW OF MARINE INSURANCE

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CHAPTER 12

THE INCHMAREE CLAUSE

INTRODUCTION

Clause 6 of the ITCH(95) and its counterpart, cl 4 of the IVCH(95), provide cover not only for some of the traditional perils of the old SG Policy,[1] but also for other perils some of which are excluded by s 55(2)(c), for example, 'any injury to machinery not proximately caused by maritime perils'.[2] Clauses 6.1.6 and 6.1.8 of the ITCH(95) insuring against loss of or damage to the subject-matter insured caused by 'contact with land conveyance, dock or harbour equipment or installation'[3] and 'accidents in loading and discharging or shifting cargo or fuel'[4] respectively can by no stretch of imagination be said to arise from a marine peril.[5] With the exception of barratry, the same holds true for the other losses enumerated in cl 6.2.

Clause 6.2 is commonly referred to as 'the Inchmaree clause'. It has derived its name from the vessel of the same name in the case of *Thames and Mersey Marine Insurance Co v Hamilton, Fraser and Co, The Inchmaree*[6] because of which it was introduced. It is sometimes called the 'Negligence Clause' by reason of the fact that it (cll 6.2.2 and 6.2.3) also insures against loss of or damage to the subject-matter caused by the negligence of two groups of persons, namely, employees on board – 'master, officers, crew or pilots'; and outsiders – 'repairers or charterers'. It has earned its third name – the 'additional perils clause'[7] – from cl 6.2.1, which insures against loss of or damage to the subject-matter insured caused by the 'bursting of boilers, breakage of shafts or any latent defect in the machinery or hull'. Unless the policy otherwise provides, such losses are generally governed by s 55(2)(c), which states that the insurer is not liable for 'any injury to machinery not proximately caused by maritime perils'.

It is to be noted that cl 6.2, but not cl 6.1, is made subject to a proviso which has to be complied with before the assured can recover for any of perils

1 Namely, perils of the sea, fire, theft, jettison, piracy and barratry.

2 Note that 'breakdown of or accident to nuclear installations or reactors' previously covered by cl 6.1.6 is no longer covered by the ITCH(95). See also cl 27 of the ITCH(95) on the exclusion for radioactive contamination.

3 Note that 'contact with aircraft or similar objects falling therefrom' previously part of cl 6.1.7 of the ITCH(83) has been moved to cl 6.2.5 of the ITCH(95) and is now subject to the due diligence proviso.

4 'Accidents in loading discharging or shifting of cargo or fuel' was previously insured under cl 6.2.1 of the ITCH(83) and was subjected to the due diligence proviso. As it is now moved to cl 6.1 of the ITCH(95), it is not longer governed by the proviso.

5 Loss of or damage caused by 'breakdown of or accident to nuclear installations or reactors' was previously covered by cl 6.1.6 of the ITCH(83). They are now no longer covered by the ITCH(95). See also cl 27 of the ITCH(95) for the exclusion of loss caused by or contributed to by or arising from radioactive contamination.

6 (1887) 12 AC 484, HL.

7 To avoid confusion, it is best that this name be not used, as it could be mistaken for the Institute Additional Perils Clauses – Hulls.

enumerated therein. The proviso will be examined later; and the relationship between s 55(2)(c) and cl 6.2, and between s 39 and cl 6.2, will be studied as and when appropriate.

Before embarking upon an analysis of the scope of cl 6.2, reference should first be made to *The Inchmaree Case*,[8] the facts of which are as follows. *The Inchmaree* was insured by a time policy. During the voyage, an engineer had negligently left a valve closed when it should have been kept opened. This caused the air-chamber of a pump worked by a donkey-engine to burst. The sole question which the House had to consider was whether the loss – that is, the cost of repairing the engine – was one of the losses or misfortunes against which the insurer had agreed to indemnify the owners of *The Inchmaree*. The House held that as the perils of the seas was not in any way responsible for the loss, her owners could not claim for the loss under the policy.[9]

As a result of the decision of the House, cl 6.2 was specially formulated in order to allow a shipowner to recover for such a loss. Only cll 6.2.1 and 6.2.2 appeared in the original version, the rest were added later. If the 1906 Act was then in existence, the House would have been able to cite s 55(2)(c) as a ground for excepting the insurer from liability: the basis for its refusal would simply be that an insurer is not liable for 'any injury to machinery not proximately caused by maritime perils'.

'CAUSED BY'

The opening words of cl 6.2, 'caused by', have been subjected to a considerable amount of litigation. Leaving aside for the moment the provision relating to negligence, one would have thought that cl 6.2.1, by itself, would be adequate to provide a shipowner with indemnity for a loss such as that which occurred in *The Inchmaree Case*. After all, it was the very reason why the clause was formulated. But the words 'caused by' have been awarded an interpretation which has limited its scope. Two Court of Appeal decisions have conclusively settled the rule that the repair or replacement cost for a boiler which has burst, for a shaft which has broken, or for any part of the machinery or hull suffering from latent defect, is not recoverable.

The first case, *Oceanic SS Co v Faber*,[10] involved a flaw in the tail-shaft caused by imperfect welding. Some years later the flaw, which was not visible on the surface at previous surveys, developed a crack and the shaft had to be replaced by a new one. The assured claimed for its replacement cost only to be turned down by the Court of Appeal which held that the clause did not cover such a loss; it did not cover latent defects in the machinery, but only for a loss '*through*'

8 *Thames & Mersey Marine Insurance Co v Hamilton, Fraser & Co* (1887) 12 AC 484, HL.

9 Overruling *West India & Panama Telegraph Co v Home & Colonial Marine Insurance Co, The Investigator* (1880), 6 QBD 51. The House was not prepared to hold that the loss was of the same genus as 'perils of the sea'.

10 (1907) 13 Com Cas 28, CA.

(the then current wording of the clause) a latent defect.[11] Lord Justice Fletcher Moulton explained that:[12]

> 'A defect initially latent, but spreading until it becomes a patent defect, is an ordinary incident in all machinery ... that is a case of a latent defect developing into a patent defect … I do not believe for one moment that this clause means that the machinery is insured against the existence of latent defects. It only means that, if through their latency those defects have not been guarded against, and actual loss of the hull or machinery, or damage to the hull or machinery arises, from those defects, the insurers will bear the burden of that loss.'

A few years later, the Court of Appeal was again confronted with the same problem in *Hutchins Brothers v Royal Exchange Assurance Corpn*,[13] where a latent defect in the stern frame became visible as a result of wear and tear during the currency of the policy. The cost of a new stern frame was held not recoverable under the policy. Lord Justice Vaughan Williams cited the following remarks made by Mr Justice Walton, the trial judge in *Oceanic SS Co v Faber*, with approval:[14]

> '... the effect and sense of this clause is not that the underwriters guarantee that the machinery of the vessel is free from latent defect, or undertake, if such defects are discovered during the currency of a policy, to make such defects good.'

In similar terms, Lord Justice Fletcher Moulton stressed that:[15]

> 'To hold that the clause covers it would be to make the underwriters not insurers, but guarantors, and to turn the clause into a warranty that the hull and machinery are free from latent defects, and, consequently, to make all such defects repairable at the expense of the underwriter.'

Subsequently, in *Scindia Steamships Ltd v The London Assurance*,[16] the same principle was applied in relation to the breakage of a shaft.[17]

To throw more light on the subject, reference should be made to a remark uttered by Mr Justice Wright in *Maccoll and Pollock Ltd v Indemnity Mutual Marine Assurance Co Ltd*.[18] Even though the policy under consideration was non-marine, his comments on the Inchmaree clause are, nonetheless, pertinent:

> '... the latent defect itself is not something covered by the policy as a casualty; it is simply a case of an inherent fault or defect which may indeed cause damage to the rest of the thing insured, and for that damage there will be a claim, but it will not be a claim in itself because in this as in other cases the original vice of the subject-matter is not covered.'

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11 The use of the words 'caused by' instead of 'through' in the current version does not make any difference as regards the intention of the clause.

12 (1907) 13 Com Cas 28 at pp 34–35, CA.

13 [1911] 2 KB 398, CA.

14 *Ibid* at p 408.

15 *Ibid*, at p 411.

16 [1937] 1 KB 639. For a further discussion of this case, see below.

17 The principle of consequential damage laid down in *Oceanic SS Co v Faber*, (1907) 13 Com Cas 28, CA; *Hutchins Brothers v Royal Exchange Assurance Corpn* (1911) 2 KB 398, CA; and *Scindia Steamships Ltd v The London Assurance* [1937] 1 KB 639, was recently applied in *Promet Engineering (Singapore) Pte Ltd v Sturge and Others, The 'Nukila'* [1996] 1 Lloyd's Rep 85, QBD.

18 (1930) 38 Ll L Rep 79, KB.

The mere discovery of a latent defect is not recoverable under the clause. Moreover, an insurer is, as a general rule, by s 55(2)(c) not liable 'for' inherent vice or nature of the subject-matter insured.

To complete this part of the discussion, it is necessary to mention *Wills and Sons v The World Marine Insurance Ltd*,[19] which so far appears to be the only case where a claim made under this clause has been successful. On this occasion, damage was caused to the hull of an insured dredger when a link of the hoisting chain of the bucket ladder gave way. The latent defect in the welding of the link, and not wear and tear, was held to have caused the loss.

BURSTING OF BOILERS

Loss of or damage to the subject-matter insured 'caused by' the bursting of boilers is recoverable, but not the cost of repairing or replacing the boiler which had burst. To recover for the latter, the assured has to identify a specific peril insured against, for example, perils of the seas, fire, explosion or negligence of the crew as the cause for the loss. Any consequential damage sustained as a result of the bursting of a boiler or an explosion would also be covered by cl 6.1.2 regardless of whether it was or was not accompanied by fire.

BREAKAGE OF SHAFTS

This limb of cl 6.2.1 is best illustrated by the case of *Scindia Steamships Ltd v The London Assurance*,[20] where the ship was in dry dock undergoing an operation which required the removal of the propeller and tail shaft. Owing to latent defect, the shaft broke and a propeller to which it was attached to also fell, causing a blade of the propeller to break. The insurer admitted liability for the replacement blade, but refused to pay for the replacement of the shaft. As the loss of the shaft was not 'caused through' (now 'caused by') a latent defect, but was the latent defect itself, the insurers were held not liable for this loss. Mr Justice Branson said that the clause, by reason of the words 'caused through' envisaged 'a state of affairs in which the main cause produces damage which has an effect on something else'.[21]

In *Jackson v Mumford*,[22] Mr Justice Kennedy, whose decision was approved on appeal, had to consider, *inter alia*, whether the breakage of a connecting-rod was so closely akin to the breakage of a shaft that the *ejusdem generis* principle should be applied to the clause. On finding that a connecting-rod and a shaft were always distinguished in the language of engineers, and that the functions performed by them were different, the clause was held inapplicable.

19 Decided in 1911, reported as a 'Note' in [1980] 1 Lloyd's Rep 350.

20 [1937] 1 KB 639.

21 *Ibid*, at p 649.

22 (1902) 8 Com Cas 61; (1904) 9 Com Cas 114, CA.

LATENT DEFECT IN THE MACHINERY OR HULL

Here, it is necessary to establish the relationship between the statutory exception of s 55(2)(c) and this part of the cl 6.2.1. First, the precise wording of the section is important. It states: 'Unless the policy otherwise provides, the insurer is not liable *for* ... inherent vice or nature of the subject-matter insured…'.[23] This relationship was referred to by Mr Justice Branson in *Scindia Steamships v The London Assurance* as follows:[24]

> '... except under those words of this clause which deal with latent defects, damage *caused by* latent defects is excluded from this clause by virtue of section 55(2)(c) of the Marine Insurance Act 1906.'

This is echoed by Arnould, who states that:[25]

> 'The cover in respect of latent defect would be virtually meaningless if this were not to be construed as applying even in cases of inherent vice. Where this part of the clause applies, therefore, a defence of inherent vice is not open to underwriters.'

With due respect, it is submitted that these comments are not quite so accurate. First, it is to be noted that s 55(2)(c) does not state that the insurer is not liable for any loss 'caused by' (or proximately caused by) inherent vice or nature of the subject-matter insured.[26] As worded, it only excludes a loss 'for', and not 'caused by', inherent vice or nature of the subject matter insured. That s 55(2)(c) and this aspect of the clause do not overlap or contradict one another is clear. They are mutually exclusive applying to different types of loss; the former to the latent defect itself, and the latter to losses 'caused by' a latent defect.[27] That the defence in s 55(2)(c) is not available to the insurer is correct, but the reason is not that to hold otherwise would render the clause meaningless, but that the section, by reason of its wording, has no relevance to a loss 'caused by' latent defect. In fact, the defence which would have been available to the insurer, if the policy had not otherwise provided, is the last exception contained in s 55(2)(c) which states that: 'Unless the policy otherwise provides, the insurer is not liable ... for any injury to machinery not proximately caused by maritime perils.'[28]

Meaning of latent defect

In *Sipowicz v Wimble & Others, The Green Lion*,[29] an American court defined a latent defect as one which 'a reasonably careful inspection would not reveal. It

23 See Chapter 10.

24 [1937] 1 KB 639 at p 648. Emphasis added.

25 Arnould, para 829.

26 Such a cause of loss is now covered by cl 6.2.1 which, as discussed earlier, employs the term 'caused by'.

27 Arnould, para 829.

28 A loss of or damage to the subject-matter insured against caused by a latent defect in the machinery or hull cannot be described as a loss caused by 'maritime perils'. The clause has to be construed as falling with the words 'unless the policy otherwise provides'. Why 'hull' has been left out of s 55(2)(c) is unclear.

29 [1974] 1 Lloyd's Rep 593, USDC (SDNY) contains a comprehensive historical account of American cases on the subject.

is not a gradual deterioration but rather a defect in the metal itself.' The plaintiffs had asserted, *inter alia*, that the sinking of *The Green Lion* had resulted from a latent defect in the vessel's machinery or hull. Water had entered the ship because the metal fastening, which secured the keel and keelson to the hull, had weakened, causing a separation to occur. These fastenings were worn out because of age, wear and lack of maintenance.

The court held that as the metal fastenings were not inherently defective in their original construction, the defect was not latent. Moreover, as the plaintiffs themselves were aware of the condition of these metal supports, the defects were clearly not latent, but patent. Any defect which is 'observable', 'accessible', 'not hidden', and not unknown, but fully revealed will not be classified as latent.

In *Jackson v Mumford*,[30] Mr Justice Kennedy expressed, by way of *obiter*, the view that weakness in the design of a connecting-rod was not a latent defect; his view is evident from his comments that a latent defect did 'not cover the erroneous judgment of the designer as to the effect of the strain which this machinery will have to resist, the machinery itself being faultless, the workmanship faultless, and the construction precisely that which the designer intended it to be'.[31]

Error in design

The above remarks give the impression that a 'latent defect' is concerned only with defects in the material used and not with error in design.[32] This conception of the term has now to be read in the light of the recent decision of *Prudent Tankers Ltd SA v Dominion Insurance Co Ltd, The Caribbean Sea*[33] in which the vessel sank as a result of the entry of sea water. The owners asserted, *inter alia*, that the loss was caused by a latent defect in the hull, owing to fatigue cracks initiated at the circumferential weld joining the nozzle to the vessel's plate. In fact, the loss was attributable to a combination of two factors: first, the manner in which the vessel was designed and, secondly, the effect upon the nozzle on the ordinary working of the vessel, causing the fracture to open up a significant period of time before the end of the life of the vessel. Basically, the issue was whether such a loss was caused by a latent defect.

30 (1902) 8 Com Cas 61.

31 *Ibid*, at p 69.

32 An American case, *Irwin v Eagle Star Insurance Co Ltd, The Jomie* [1973] 2 Lloyd's Rep 489, USCA, has held that to constitute a latent defect, there has to be a defect in the metal: it does not cover a mistake made by the air conditioning firm in joining iron and brass in an under-sea-waterfitting.

33 [1980] 1 Lloyd's Rep 338. It is to be noted that the view expressed by Kennedy J was *obiter*, and when the case went on appeal this issue was not considered. Further, it is pertinent to observe that the views expressed by Goff J (as he then was) in *The Carribean Sea* was also in the court of first instance. The American position as stated in *Irwin v Eagle Star Insurance Co Ltd, The Jomie* [1973] 2 Lloyd's Rep 489 is in line with the opinion of Kennedy J.

Applying a well-known test used in contracts of affreightment, he arrived at the conclusion that, as the cracks 'could not be discovered on such examination as a reasonably careful skilled man would make', they were latent defects.[34] The most instructive part of his judgment reads as follows:

> '... in considering whether there was a defect *in* the hull or machinery which directly caused the loss of or damage to the ship, one is concerned with the actual state of the hull or machinery and not with the historical reason why it has come about that the hull or machinery is in that state.'

Accordingly, the loss was held to have been caused by a latent defect even though it had originated and developed as a result of an error or defect in design. The cause for the defect was considered irrelevant. This interpretation, which has yet to be approved by a higher court, has the support of Arnould.[35]

Latent defect and unseaworthiness

A defect, whether latent or patent, in hull or machinery would render a vessel unseaworthy but only if it impinges upon her ability to encounter the ordinary perils of the sea. Thus, not all latent defects existing in the hull or machinery of a ship will automatically cause her to become unseaworthy. The defect has to be in relation to a matter which affects her capability to combat ordinary sea perils. A defect in loading equipment, for example, would not affect a ship's ability to encounter the ordinary perils of the sea.[36] In each case, the nature of the defect has to be examined.

It has been pointed out by Arnould, citing American cases in support, that there is a 'conflict' between this part of the clause (6.2.1) which insures against a loss caused by latent defect, and s 39(1) which implies a warranty of seaworthiness in a voyage policy.[37] As the law relating to seaworthiness is different in time and voyage policies, it is necessary to divide this study into two parts:[38] voyage policies will first be discussed, and then time policies.

Voyage policy

Arnould, in a brief statement, submits that:[39]

> '... the latent defect cover, must ... be regarded as overriding the implied warranty of seaworthiness in voyage policies, to the extent that there is a conflict between the implied warranty and this head of cover. The point has not been decided in this country, but the majority of the American cases proceed on the basis that unseaworthiness is no answer to a claim in respect of "latent defect".'

34 The test propounded in *Brown v Nitrate Producers' SS Co* (1937) 58 Ll L Rep 188, a contract of affreightment case, was applied. Goff J showed preference for this definition rather than the American definition declared in *Parente RA v Bayville Marine Inc & General Insurance Co of America* [1975] 1 Lloyd's Rep 333, USNY.

35 Arnould, para 831.

36 For the meaning of seaworthiness, see Chapter 7.

37 Park, *Marine Insurance and Average*, Chapter XIV, p 387, also relying on American authorities describes this 'conflict' as an 'anomaly'.

38 Discussed in Chapter 7.

39 Arnould, para 829.

The legal position, as can be seen shortly, is not as straightforward as described above.

Breach of the implied warranty of seaworthiness

It has to be stressed that the implied warranty of seaworthiness, spelt out in s 39(1), is applicable only 'at the commencement of the voyage'. In the event of a breach the insurer is discharged, now 'automatically' discharged, from liability as from the date of breach, that is, at the commencement of the voyage. Regardless of the cause of loss, and even if no loss has occurred, the insurer is automatically freed from liability as from the time of breach.[40] Thus, unless the breach has been waived, it is submitted that there can be no question of referring to the Inchmaree clause or, for that matter, any of the enumerated perils in the policy as the basis of a claim. More significantly, the House of Lords has recently in *The Good Luck*[41] emphasised that a promissory warranty in marine insurance is actually a condition precedent to the further liability of the insurer. Unless the 'condition precedent' (or the warranty) is fulfilled, the insurer is automatically discharged from liability. Thus, if the implied warranty of seaworthiness is not complied with, the insurer is automatically discharged from liability as from the date of breach, which is 'at the commencement of the voyage', at which point of time the warranty is applicable. Once a breach of the implied warranty has been committed, any loss occurring *after* the commencement of the voyage would not be covered.

Having been automatically discharged from liability or further liability as from the commencement the voyage, it is indeed difficult to see how this clause, or for that matter any of the insured perils, could be invoked. Consequently, it is submitted that the clause cannot override or prevail over the implied warranty of seaworthiness. Naturally, in an 'at and from' policy, he would be able to recover for any loss sustained whilst the ship is 'at' the named port, after the attachment of the risk but before the commencement of the voyage. Any loss suffered before the commencement of the voyage is unaffected by a breach of the warranty.

It is, of course, always possible to exclude the implied warranty by means of an express clause. However, it can be overridden only by 'express, pertinent, and apposite language'.[42] There is, however, nothing in the IVCH(95) excluding the implied warranty of seaworthiness, and the 'held covered' clause (clause 2) does not cover such a breach.[43] Thus, unless a clear and express clause is specially inserted in the policy,[44] the implied warranty of seaworthiness will prevail. The purpose of cl 4.2.1 is to provide cover for a loss caused by latent defect, not for excluding or negativing the implied warranty of seaworthiness

40 See s 33(3) and *The Good Luck* [1991] 2 Lloyd's Rep 191, HL.

41 *Ibid*. The effects of a breach of a warranty are discussed in Chapter 7.

42 See *Quebec Marine Insurance Co v Commercial Bank of Canada* (1870) LR 3 PC 234 at p 242.

43 By cl 2 only a 'breach of a warranty as to towage or salvage services' are held covered.

44 See ss 35(2) and (3). Under common law, only three clauses, namely, the 'allowed to be seaworthy'; the 'seaworthiness admitted' clause; and the 'held covered in case of any breach of warranty at a premium to be hereinafter arranged' clause were found acceptable by the court as capable of excluding the implied warranty of seaworthiness from the contract of insurance. For a detailed study of this subject, see Chapter 7.

Unseaworthiness under a time policy

In a time policy, the legal principles relating to seaworthiness are more complex. Unlike a voyage policy, there is, under British law, no implied warranty of seaworthiness in a time policy. Whereas causation and privity are irrelevant in a voyage policy, they are of utmost importance in a time policy. The relevant part of s 39(5) states that: '... where with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness'. All three factors, namely, (a) the vessel has to be unseaworthy; (b) the loss has to be attributable to unseaworthiness; and (c) the assured has to be privy to such unseaworthiness which has caused the loss, have to be satisfied before the insurer can be exonerated from liability.[45]

To determine whether there is an anomaly between s 39(5) and cl 6.2.1, the elements of privity and causation have to be considered in relation to the terms of, and to the proviso to, cl 6.2. First, it is to be noted that the very essence of a latent defect is that it is not discoverable even with the exercise of due diligence. As such, it is a defect which the assured cannot be privy to, and if he has knowledge of such a defect, then the defect cannot be 'latent'.

Should a shipowner be privy to the vessel's condition of unseaworthiness to which the loss is attributable, he would not only be unable to recover under s 39(5), but also under cl 6.2.1 by reason of the fact that the defect is not latent in character.[46] On the other hand, should he be not privy to the (latent) defect to which the loss is attributable to, the insurer would be liable under s 39(5). A loss 'caused by' a latent defect is 'attributable to' unseaworthiness, if unseaworthiness is a cause of the loss.[47] Provided that the loss has 'not resulted from the want of due diligence by the assured, owners, managers or superintendents,' it would also be recoverable under cl 6.2.1. The non-discovery of the latent defect would not by itself constitute a breach of the proviso, for no amount of due diligence exercised would reveal the defect. It is incapable of being discovered even with the exercise of due diligence.

There is, therefore, no conflict between the terms of s 39(5) and the latent defect cover of cl 6.2.1. In fact, they complement each other. In conclusion, it is submitted that caution should be exercised when relying on American authorities, especially in this area of law when British and American law differ. There is an implied warranty of seaworthiness in a time policy under American law, but not under British law.

NEGLIGENCE OF MASTER OFFICERS CREW OR PILOTS

Section 55(2)(a) and cl 6.2.2 of the ITCH(95) together provide considerable coverage to an assured for any loss or damage, proximately or remotely, caused by the negligence of master or crew. A loss proximately caused by a peril

45 For a detailed discussion of the law relating to seaworthiness in a time policy, see Chapter 7.

46 It is necessary to be reminded of the fact that s 39 is not restricted to unseaworthiness by reason of latent defect; it applies to all forms of unseaworthiness.

47 See Chapter 8.

insured against but remotely caused by the negligence of the master or crew is covered by s 55(2)(a).[48] This part of the discussion is concerned with negligence operating as the proximate cause of loss; such a cause of loss is governed by cl 6.2.2 which provides indemnity for 'loss of or damage to the subject-matter insured caused by ... negligence of master, officers, crew or pilots'.[49] Of course, these words refer to personnel on board the insured vessel.[50]

It is to be noted that only negligence, not misconduct, incompetence or error in judgment, is insured by cl 6.2.2[51] However, on payment of an additional premium, the insurance could be extended to cover 'loss of or damage to the vessel caused by any accident or by negligence, incompetence or error of judgment of any person whatsoever'.[52] In so far as the misconduct of master or crew is concerned, the assured would be able to recover as for a loss by barratry, if the act was wilfully committed 'to the prejudice of the owner, or, as the case may be, the charterer'.[53] But if the misconduct of master or crew which has proximately caused the loss does not amount to barratry, the loss would not be recoverable. Moreover, s 55(2)(a) would be of no assistance to the assured as it applies only to misconduct (and negligence) of master or crew operating as a remote cause of loss.[54]

Negligence as the proximate cause of loss

Though the word 'proximately' has not been used to qualify the term 'caused by' appearing in the opening words of cl 6.2 (and 6.1) of the ITCH(95), it has always been understood that the rule of proximate cause has to be read into it.[55] Thus, cl 6.2.2 can only be invoked when the negligence of the master, officer, crew or pilot is *the* or *a* proximate cause of loss. Surprisingly, there is hardly any British authority directly concerned with this provision. Only two reported cases, namely, *Lind v Mitchell*[56] and *Baxendale v Fane, The Lapwing*,[57] have been identified to be concerned with this point of law. In both cases, the court was prepared to invoke the negligence cover of the Inchmaree clause but only as an alternative ground for its decision.

48 The law in this regard has already been discussed in depth earlier, see Chapter 9.

49 As a pilot is specifically named, the question of whether or not he is a member of crew is now academic. Ship's engineers would now fall within the category of 'officers' or 'crew'.

50 The 1931 version of this clause insured against the negligence of 'Master mariners, engineers or pilots'. The word 'mariners' was interpreted in an American case, *Rosa and Others v Insurance Co of the State of Pennsylvania, The Belle of Portugal* [1970] 2 Lloyd's Rep 386, USCA (Ninth Circuit) as wide enough to cover a loss caused by the negligence of the crew of another vessel.

51 *Cf* American Liner Negligence Clause.

52 See cl 1.1.2 of the Institute Additional Perils Clauses (Hulls); see Appendix 16.

53 For a discussion of the law of barratry, see below.

54 The law of causation is fully discussed in Chapter 8.

55 See *Coxe v Employers' Liability Assurance Corpn Ltd* [1916] 2 KB 629 at p 634. For a thorough examination of the law of proximate cause, see Chapter 8.

56 (1928) 45 TLR 54, CA.

57 (1940) 66 Ll L Rep 174.

In the first case, the facts of which have already been referred to earlier,[58] the plaintiff, a mortgagee, claimed that the ship was lost by a peril of the seas and/or fire and, alternatively, through the negligence of the master in unreasonably abandoning her prematurely. On the question of fact, the Court of Appeal agreed with the finding of the trial judge that: 'The ship sank ... because she had been holed in the ice. That was the real and only cause of her loss'. As such, the negligence of the master, whose conduct only came afterwards, could only be regarded as a remote cause of the loss.

Lord Justice Sankey was content with simply relying on perils of the seas and s 55(2)(a) as the grounds for his decision. Lord Justice Scrutton, however, the only judge in the case who made an effort to examine the wording of the clause (which in this case stated that the underwriter insures against loss of the vessel 'caused through the negligence of master') pointed out that, as the word 'directly' which appeared in another part of the clause had been left out of the negligence cover, negligence as a remote cause of loss was covered. Such a construction cannot be applicable to cl 6.2.2 which is worded differently.

In *The Lapwing*,[59] instead of 'caused through' the expression 'directly caused by' was used in the clause in question. Mr Justice Hodson decided that as the loss was fortuitously caused (by the intervention of the negligence of those responsible for the docking operation), it was recoverable as a peril of the seas or as a peril *ejusdem generis* with a peril of the seas, *viz*, stranding. He then proceeded to ascertain whether the negligence cover could be invoked as an alternative ground for his decision.

On the issue of negligence, he had to consider whether the manager of the ship-repairing company, by whose conduct the ship was negligently docked and as a result of which she sustained damage to her bottom, was the 'master' of the ship. Citing the definition of 'master' from the Merchant Shipping Act 1894 as authority, he held that as the manager was in 'command or charge' of the ship at the time of loss he was *pro hac vice* the 'master' of the ship. From this, he concluded that the said clause applied.

Regrettably, the judge had overlooked the phraseology of the clause. The word 'directly', although superfluous, has emphasised that only the negligence of the master or crew which has 'directly' or proximately caused the loss was covered. As worded, its legal effect is no different from that of cl 6.2.2. Thus, unless the negligence of the master was the only proximate cause, or one of two or more proximate causes of loss, it is difficult to see how the clause in question could be invoked.

In the event where there is no marine peril operating as the proximate cause of loss, cl 6.2.2 would be of particular use to the assured. It would be especially useful in a case such as *The Inchmaree*[60] where perils of the seas was not in any way responsible for the loss.

58 See Chapter 15.

59 (1940) 66 Ll L Rep 174.

60 (1887) 12 AC 484, HL, see Chapter 9.

Another case which, it would appear, has also misapplied this cover is the Canadian case of *The Brentwood*,[61] the facts of which have already been briefly stated elsewhere. The time policy in this case contained a clause similar to that in *The Lapwing*.[62] Bearing in mind the finding of the trial judge that unseaworthiness 'alone' was the proximate cause of loss,[63] a finding which the Appeal Court did not disturb, it is difficult to justify the application of the clause. Unless the negligence of the master was held to be another proximate cause of loss,[64] it is submitted that the Appeal Court had no justification for invoking the clause.

It would appear that the confusion which had arisen in these cases regarding the applicability of cl 6.2.2 (and s 39(5)) is largely due to the issue of causation. They were decided at a time when the law was unclear as to whether it was possible for there to be more than one proximate cause of loss.[65] A proper finding of the proximate cause or causes of a loss is critical to the outcome of a case. It is pertinent to note that cl 6.2.2 applies only if the negligence of the master, officers, crew or pilot is *the* or *a* proximate cause of a loss.[66]

Negligence of the assured

It is observed that an assured is not named in the list of persons for whose neglect is covered by cl 6.2.2.[67] It would not, therefore, be unreasonable to assume that any loss proximately caused by the negligence of an assured is not recoverable.[68] Moreover, as the assured has himself committed an act of neglect, he would not be able to satisfy the terms of the proviso that the damage or loss has not resulted from the want of due diligence on his part. The position, however, is different if an assured-shipowner were to be employed on board as 'master, officer, crew, or pilot': any loss proximately caused by his neglect committed whilst acting in any of these capacities would be covered by cl 6.2.2 read with cl 6.3.

61 [1932] 2 Lloyd's Rep 232; also discussed below and in Chapters 7 and 8.

62 (1940) 66 Ll L Rep 174.

63 The trial judge, relying on the Canadian counterpart to our s 39(5), awarded judgment in favour of the plaintiffs. As submitted earlier such a cause of loss is not a peril insured against and, therefore, should not be recoverable, regardless of whether the assured was or was not privy to such unseaworthiness. See Chapters 7 and 8.

64 There is no reason why unseaworthiness and the negligence of the master cannot both be held to be proximate causes. See *The Miss Jay Jay* [1987] 1 Lloyd's Rep 32, CA.

65 See, in particular, *The Miss Jay Jay*, *ibid*, and the cases discussed in Chapter 8.

66 Section 55(2)(a) applies to negligence of master or crew occasioning as a remote cause.

67 To dispel all doubts, the draftsman of the clause could have easily, as in a Canadian version of the clause, inserted the words 'other than an assured' into cl 6.2.2: see *The Brentwood* [1932] 2 Lloyd's Rep 232.

68 Though a case on insurance of cargo, *M R Currie & Co v The Bombay Native Insurance Co* (1869) LR 3 PC 72 may be cited to support this principle. The assured who had failed to act upon the advices of various surveyors that the cargo could be saved was prevented from recovering for the loss. The Privy Council (at p 81) said: '... how can the Assured recover from the Underwriters a loss which was made total by their own negligence?'. It would appear that the loss was held not recoverable on two grounds: first, the loss was proximately caused by the negligence of the assured which was not a peril insured against and, secondly, as the assured had failed to sue and labour, he was 'precluded' from claiming for the loss of the cargo. Further discussions of the law on sue and labour can be found in Chapter 17.

Shipowner acting as master, officer, crew or pilot

A shipowner acting as master, officer crew or pilot on board his own ship can, of course, by negligent navigation cause damage to or the loss of his own ship. In this regard, there are two clauses which would have to be read with cl 6.2.2. First, cl 6.3 states that 'master officers, crew, or pilots' are 'not to be considered as Owners within the meaning of cl 6 should they hold shares in the Vessel'. Secondly, the proviso to cl 6.2 has to be complied with before the shipowner would be allowed to recover for any loss falling within one of the perils enumerated therein. The relationship between cll 6.2.2, 6.3 and the proviso is not at all clear. In fact, on first reading, they could well appear to be contradictory but, as can be seen shortly, they could also be interpreted so as to complement each other. There is no litigation in the British courts on this subject. Nonetheless, the wording, scheme and objective of the clauses will have to be examined.

Part owner and co-owner

First, the last few words of cl 6.3 connote part ownership. Read with cl 6.2.2 and its proviso, a part owner acting in the capacity of master (officer, crew or pilot) is not in relation to the proviso to be considered as 'owner'.This necessarily means that his neglect or want of due diligence is to be regarded as irrelevant in so far as the proviso is concerned.

The objective of cl 6.3 is to enable a part owner to claim for any loss which he has negligently (and proximately) caused whilst acting in the capacity as master etc, of the vessel.[69] But for cl 6.3, it would not have been possible for him to recover for the loss under the policy, because his act of neglect would constitute a want of due diligence under the proviso. In the absence of cl 6.3, his co-owners would also be prejudiced by his act of neglect. Clause 6.3 was therefore framed to circumvent the problems generated in the event of a shipowner wearing two hats, one as owner and the other as master (or crew) of his own ship. It serves to provide not only the part owner (who has been negligent), but also his co-owner(s) with the right to recover for a loss under cl 6.2.2. Notwithstanding the fact that one of the owners has through his neglect or want of due diligence caused damage to or loss of the vessel, cl 6.3 has allowed all the owners the right claim for the loss under cl 6.2.2. The effect of cl 6.3 is to prevent an act of neglect committed by a part owner whilst acting as master from tainting not only his own claim, but also that of his co-owner(s).

Sole owner

Whether a sole owner who, whilst acting as master, has negligently caused damage to or the loss of his own ship is able to recover for a loss has to be considered, even though such a contingency might appear to be unlikely in this

69 In *The Trinder Case* [1898] 2 QB 114, CA, perils of the sea was held the proximate cause and the negligence of the owner-master, a remote cause of the loss.

day of corporate ownership.[70] Whether this was in the minds of the draftsmen when these clauses were framed is doubtful.[71]

On a literal interpretation of cl 6.3, a sole owner does not appear to be covered. This could create an anomalous situation whereby a part owner acting as master is able to recover for any loss which he has caused by his own neglect, but not a sole owner in the same position. Should this be the case, a sole owner should leave well alone matters relating to navigation, and appoint a third party to crew his ship. Presumably, as only one person is involved and, consequently, there being only one directing mind, difficulties may be encountered when distinguishing the roles in which he was acting at the time of loss.[72]

There is, however, no reason why judges should not be able to differentiate between an act committed by the master *qua* master and *qua* owner. The making of such a distinction, which is carried out all the time in petitions for limitation of liability, would permit a sole owner to recover under cl 6.2.2 for a loss caused by him whilst acting in the capacity of master but not of owner.

This anomaly in the law has inspired authors to draw a line between the duties which have to be performed *before* and *during* the voyage. Arnould holds the view that, 'the proviso would probably be restricted to failure to exercise due diligence to prepare or equip the ship for the voyage'.[73] And it has been said that in practice, it has been recognised that 'the lack of due diligence during the voyage is not usually treated by underwriters as being within the proviso …'.[744]

Such a division of duties would remove the anomaly and prevent the conflict between cl 6.2.2 and the proviso from arising. It would give each of the clauses its own respective sphere of coverage: the proviso reserved for responsibilities pertaining to the preparation of the ship *before* the voyage, and cl 6.2.2 for duties to be performed *during* the voyage.

On cl 6.3, Arnould states that:[75]

> 'The stipulation that a master, etc, who holds shares in the vessel is not to be considered as part-owner would appear to narrow the scope of the proviso, so as to preserve the cover in cases where members of the ship's complement who hold shares in the vessel are negligent in preparing her for sea.'

The above approach of separating the duties to be performed before and during the voyage by the shipowner would also prevent cl 6.3 from 'narrowing' down the scope of the proviso.

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70 In small coastal vessels and fishing vessels it is not uncommon for a sole owner to act as master of his own vessel.

71 If the intention was to include a sole owner, it could have worded the clause in clearer terms. It could have used words to the effect that, 'should they own or holds shares in the vessel', or 'should they hold all or any shares in the vessel'.

72 Such was the position under the common law of limitation of liability law (see *The Spirit of the Ocean* (1865) 34 LJ Ad 74; B & L 336) until the enactment of s 3 of the MS (Liability of Shipowners and Others) Act 1958. See *The Annie Hay* [1968] 1 Lloyd's Rep 141.

73 Arnould, para 832.

74 See O'May, p 137.

75 Arnould, para 832.

If the neglect in the performance of his duties as master was to cause the loss, cl 6.2.2 would apply; and provided that he (whether sole or part-owner) was not guilty of the want of due diligence in discharging his responsibility as owner, the proviso would be fulfilled. The shipowner's claim should not be invalidated merely by reason of him being both owner and master of the same ship. The solution to the problem is to determine which hat the assured was wearing at the time when his was negligent: if the loss was caused whilst carrying out the duties of master, it would be covered by cl 6.2.2, but if he was acting as owner cl 6.2.2 would not apply, as a loss caused by the negligence of an assured is not covered.

Negligence of the master or crew and unseaworthiness

The difference in the law relating to seaworthiness between voyage and time policies once again dictates that this discussion be divided into two parts: the first part will examine the application of the concept of seaworthiness and privity in a time policy, and the second, the implied warranty of seaworthiness in a voyage policy.

Time policy

The relationship between s 39(5) on seaworthiness in a time policy and cl 6.2.2 on negligence is not as distinct as that between s 39(5) and cl 6.2.1 on the latent defect cover described earlier. It has been said that there is somewhat of an anomaly evident in these relationships. A ship can be rendered unseaworthy as a result of an act of negligence committed by the master and/or crew. In such an event, both cl 6.2.2 (and its proviso) and s 39(5) would have to be considered.

To illustrate this relationship, the Canadian case of *The Brentwood* may again be referred to, the facts of which are as follows. As a consequence of improper loading, the vessel was rendered unseaworthy. This affected her stability causing her to roll over and later to be abandoned when she was found to be taking in water. The trial judge decided that:

- the proximate cause of the loss was unseaworthiness 'alone' due to improper loading; or
- the improper loading was due to the negligence of the master; and
- the owner was not privy to the negligence of the master.

Using this set of facts for the purpose of discussion, there are four possibilities which have to be considered. First, if the negligence of the 'master officers, crew, or pilots' is held to be the sole proximate cause of the loss, then, provided that such loss or damage has not resulted from the want of due diligence by the assured, etc, the insurer is liable.

Secondly, if unseaworthiness is the sole proximate cause of loss, then the loss, as submitted above, is simply not recoverable because unseaworthiness is not a peril insured against.[76] In such an event, it should be unnecessary to

76 See Chapter 7.

invoke s 39(5) to ascertain whether the assured was or was not privy to such unseaworthiness which caused the loss.[77]

Thirdly, it is also possible that negligence and unseaworthiness may both be regarded as proximate causes of the loss. In such a case, as unseaworthiness is not an insured peril, on this ground alone the loss is not recoverable. But as negligence is also another proximate cause, cl 6.2.2 has to be brought into play. It has to be mentioned that, as a loss proximately caused by unseaworthiness is generally not *expressly* excepted in a standard hull policy, there is still room for the application of the terms of the included loss, that is, cl 6.2.2; and provided that the due diligence proviso is fulfilled, it would appear that the assured would be allowed to recover for the loss.

Finally, if negligence alone is found to be the proximate cause of loss and unseaworthiness a remote cause, then both cl 6.2.2 and s 39(5) will apply.[78] The latter is applicable by reason of the fact that the loss is, by virtue of its wording, 'attributable to' unseaworthiness. In such a circumstance, a conflict could arise in which case it may be necessary to determine which provision, cl 6.2.2 or s 39(5) is to prevail. It is interesting to note that in *The Brentwood*, the decision of the Appeal Court was based almost primarily, if not exclusively, on cl 6.2.2. Though the assured, having found not to have been privy to the unseaworthiness, had complied with the proviso to our s 39(5), they were nevertheless found wanting in due diligence in not seeing that the vessel was properly loaded. Their appeal was dismissed because they had failed to satisfy the terms of cl 6.2.2. It would appear from this decision that an assured has to satisfy both the 'privity' and the 'due diligence' proviso to s 39(5) and cl 6.2.2 respectively. Needless to say, if they were found privy to the vessel's condition of unseaworthiness, that is, the improper loading, they would also be found guilty of the want of due diligence in failing to take action to remedy the fault.[79]

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77 *Cf The Brentwood* [1973] 2 Lloyd's Rep 232, the lower court, after accepting that it was 'unseaworthiness alone' which had caused the loss proceeded immediately to determine whether the assured was 'privy' to the master's negligent act of overloading the ship. As the assured was able to satisfy the proviso to the Canadian equivalent to our s 39(5), judgment was awarded in their favour. Regrettably, the court failed to consider the fact that unseaworthiness was not an insured peril in the policy under consideration. Interestingly, the court also took time to determine whether the due diligence proviso to the negligence cover (our cl 6.2.2) was satisfied. And as the assured was found not guilty of the want of due diligence, they were able also on this ground to recover their loss.

78 Negligence of master or crew operating merely as a remote cause is always inconsequential: s 55(2)(a).

79 Arnould, at para 831, in fn 80, states: 'It was held in *Lemar Towing v Fireman's Fund Insurance Co* (1973) AMC 1843 that the negligence cover in the Inchmaree clause does not apply where the proximate cause of loss is crew-incompetence amounting to unseaworthiness; but it is submitted that this is unsound and that the Inchmaree clause covers negligence by incompetent crew members except in so far as defences based on breach of the warranty of seaworthiness in a voyage policy, or on the due diligence proviso, or s 39(5) of the 1906 Act may be open'. It is the author's submission that the above statement is correct but only if negligence is 'the' or 'a' (in the sense of one of two or more) proximate cause of the loss. It is significant to note that in *The Lemar Towing Case*, the incompetence of the captain was held to have rendered the vessel unseaworthy at the commencement of the voyage; and unseaworthiness, and not the negligence of the master or crew, was the proximate cause of the loss. It was clearly on these findings of fact that the court was able to, and rightly so, dismiss the relevance of the negligence cover in the Inchmaree clause. Moreover, as there is an implied warranty of seaworthiness in a time policy under American law, *(continued …)*

Summing up, whether s 39(5) and/or cl 6.2.2 applies in each case is dependent upon what is regarded as the proximate cause or causes of the loss.

Voyage policy

In a voyage policy, the position is less complex because of the absolute special nature of the implied warranty of seaworthiness in a voyage policy: a breach of the implied warranty of seaworthiness under s 39(1) would simply, regardless of the cause of loss, automatically discharge the insurer from liability. Questions relating to causation do not arise, as breach of the warranty *per se* is sufficient to free the insurer from liability. The guilt or innocence of the assured is also immaterial.

It is, however, also important to bear in mind that the implied warranty applies only at the commencement of the voyage. Once it has been complied with, there is no continuing warranty of seaworthiness and, therefore, any loss arising after the commencement of the voyage, proximately or remotely caused by unseaworthiness, will not affect the warranty which has by then already been spent.[80] Any loss proximately caused by the subsequent unseaworthiness is not recoverable because such a cause of loss is not a peril insured against. And if unseaworthiness is found to be the remote cause then one has to ascertain what the proximate cause of loss is to determine the liability of the insurer.

NEGLIGENCE OF REPAIRERS OR CHARTERERS

Clause 6.2.3 of the ITCH(95) and cl 4.2.3 of the IVCH(95) insure against loss of or damage to the subject-mater caused by 'negligence of repairers or charterers provided such repairers or charterers are not an assured hereunder'. Very little need be said about this cover except that if the repairers or charterers are themselves the assured under the policy, they would not be able to claim for the loss the reason being that the underwriters would not be able to recover by way of subrogation from the negligent repairers or charterers as they are also the assured. It is important to be reminded of the fact that the cover is for physical loss of or damage to the subject-matter insured caused by the repairers' or charterers' negligence.

(*cont'd*)

the breach of the warranty itself would be sufficient, regardless of the cause of loss, to discharge the insurer from liability for the loss as from the date of the breach, that is, at the commencement of the voyage. Even if an express cover for 'incompetence' were to be included in the Inchmaree clause, as in the American liner negligence clause, incompetence has still to proved to have proximately caused the loss before it could be applied.

80 See *Redman v Wilson* (1845) 14 M & W 476, where the court held that as the ship was seaworthy when she sailed from London, the loss, though remotely caused by the negligence of the natives in loading her, was proximately caused by a peril of the seas.

BARRATRY OF MASTER OFFICERS OR CREW

INTRODUCTION

The peril of 'barratry of master officers or crew' is specifically insured under cl 6.2.4 of the ITCH(95)[81] and cl 4.2.4 of the IVCH(95) both of which are subject to the proviso that such loss or damage must not have not resulted from the 'want of due diligence by the assured, owners, managers or *superintendents or any of their onshore management*.'[82]

Barratry was an insured peril under the old SG policy which was applicable to both ship and goods. Under the ICC (A) it is an insured peril by reason of the fact that such a policy covers all risks. It is, however, not an insured peril under the ICC (B) and (C). Moreover, it is excluded by cl 4.7 of the general exclusions clause[83] which, in broad terms, states that the policy does not cover 'deliberate damage to or deliberate destruction of the subject-matter insured or any part thereof by the wrongful act of *any person or persons*'. The words 'any person or persons' are wide enough to include the acts of the master and crew. The ensuing discussion is thus relevant only to the ITCH(95), the IVCH(95) and to a policy in which barratry is expressly insured.

DEFINITION OF BARRATRY

The common law

Before proceeding to elicit the essential requirements of the term 'barratry' through an analysis of the wording of the statutory definition contained in r 11 of the Rules for Construction, it would be helpful at this juncture to revert to the judgments of some of the classic authorities which have shed light on the subject. Barratrous conduct may be broadly divided into three groups: fraud, neglect of duty and criminal conduct.

Knight v Cambridge[84] is perhaps the first reported case to define 'barratry'. Equating it with fraud, the judge remarked that: 'And he that commits a fraud, may properly be said to be guilty of neglect … of his duty .... its imports any fraud'. The same was reiterated in *Boehm v Combe*[85] to the effect that: 'The word barratry was large enough to include every species of fraud or *malus dolus*'. On neglect of duty, Lord Ellenborough pointed out in *Heyman v Parish* that[86] 'a gross malversation by the captain in his office is barratrous'. Later, in *Stamma v*

81 Previously cl 6.2.5 of the ITCH(83).

82 Words in italics are inserted by the ITCH(95) and the IVCH(95); they are neither in the ITCH(83) nor the IVCH(83).

83 There is no such provision as cl 4.7 (or its equivalent) in the ICC (A). The principle that barratry cannot be committed against a cargo owner is reflected in the ICC (B) and (C).

84 (1724) 2 Ld Raym 1349.

85 (1813) 2 Maule & Selwyn 172; 105 ER 172.

86 (1809) 2 Camp 149.

Brown,[87] the element of criminality was introduced; it was said that 'to make it barratry there must be something of a criminal nature, as well as a breach of contract …'.

In 1774, the learned Lord Mansfield in *Vallejo v Wheeler*[88] referred to the Italian Dictionary for the meaning of the word '*barratrare*'. In strong, unflattering language, his translation into English defined the conduct as: 'to cheat, and whatsoever is by the master a cheat, a fraud, a cozening, or a trick ... nothing can be so general'. Another judge depicted the act as one of 'knavery of the masters or mariners'.

Finally, in *Earle v Rowcroft*[89] all three elements were combined in one definition to the effect that '… a fraudulent breach of duty by the master, in respect to his owners ... with a criminal intent, or *ex maleficio*, is barratry'. In this case, the main issue which the court had to consider was whether the conduct of the master in going to an enemy's settlement to trade (as cargo could be more speedily and cheaply obtained there) consequently causing the ship to be seized and confiscated was barratrous. It was clear that even though the act of the master was criminal in nature his intention was not dishonourable. On the subject of criminality, the court firmly ruled that:

> 'For it is not for him [master] to judge in cases not intrusted to his discretion, or to suppose that he is not breaking the trust reposed in him, but acting meritoriously, when he endeavours to advance the interests of his owners by means which the law forbids, and which his owners also must be taken to have forbidden, not only from what ought to be, and therefore must be presumed to have been, their own sense of public duty, but also from a consideration of the risk and loss likely to follow from the use of such means.'

The law as declared in *Earle v Rowcroft*[90] is regarded by some of the modern day judges as the most acceptable of the judicial definitions of barratry.

Later, however, the Chief Justice presiding in the Privy Council in *Australian Insurance Co v Jackson*[91] pointed out that the most comprehensive definition of barratry can be found in the 1st edn of Arnould on *Marine Insurance*.[92] Incorporating all the features described, it states that:

> 'Barratry then in English law may be said to comprehend not only every species of fraud and knavery covinously committed by the master with the intention of benefiting himself at the expense of his owners, but every wilful act on his part of known illegality, gross malversation, or criminal negligence, by whatever motive induced, whereby the owner or charterers of the ship (in cases where the latter are considered as owners *pro tempore*) are in fact damnified.'

87 (1742) 2 Stra 1173.

88 (1774) 1 Cowp 143 at p 154. The Chief Justice was of the opinion that before this, 'the nature of barratry had not been judicially considered or defined in England with accuracy'.

89 (1806) 8 East 126.

90 *Ibid*.

91 (1875) 33 LT 286, PC.

92 Arnould, para 820.

The most recent case to have analysed and traced the historical development of barratry is *The Salem*.[93] Mr Justice Mustill in the court of first instance remarked that: 'This strange word, which has featured in policies of marine insurance since mediaeval times, originally had the connotation of "trickery"'.

A modern American definition of barratry can be found in *The Hai Hsuan*[94] to the effect that:

> 'Barratry is one of the enumerated perils against which the defendants insured the plaintiff. This is a generic term which includes many acts of various kinds and degrees. It comprehends any unlawful, fraudulent or dishonest act of the master or mariners and every violation of duty by them arising from gross and culpable negligence contrary to their duty to the owner of the vessel, and which might work loss or injury to him the course of the voyage insured.'

Statutory definition of barratry

Compared to the common law, r 11 has adopted a more general approach in its definition of barratry. It states that:

> 'The term "barratry" includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer.'

As almost every word of the definition is significant, each will be discussed separately. First, it has to be pointed out that the word 'includes' suggests that the definition is not exhaustive.

'Wrongful act'

The word 'wrongful' used to describe the barratrous act is wide enough to embrace all the three aspects of barratry mentioned earlier, namely, fraud, breach of duty and criminal conduct. *Stamma v Brown*,[95] however, has given the impression that barratry is a criminal act and, therefore, the commission of a crime has to be proved before an act could be held barratrous. But an act can be 'wrongful' without being criminal in nature and thus criminality is not a mandatory requirement. This is confirmed in *Compania Naviera Bachi v Henry Hosegood & Co Ltd*,[96] where the pertinent part of the judgment read as follows:

> 'I do not think that for the purpose of barratry the commission of a crime is necessary. It must be a wilful act deliberately done, and to the prejudice of the owners. It is not necessary that the person doing it should desire to injure the owners if in fact there is an intention to do an act which will cause injury, even if the act be done to the benefit of persons who are guilty of barratry.'

93 [1981] 2 Lloyd's Rep 316 at p 324, QBD.

94 *Republic of China, China Merchants Steam Navigation Co Ltd and United States of America v National Union Fire Insurance Co of Pittsburgh, Pennsylvania* [1958] 2 Lloyd's Rep 578.

95 (1742) 2 Stra 1173.

96 [1938] 2 All ER 189. The court had, in relation to a dispute under a charterparty, to consider whether the conduct of the crew was barratrous under the terms of a clause which excepted the carrier from liability for acts of barratry of the master or crew. As the law on barratry in charterparties is the same as that in marine insurance, the comments of Porter J are thus also relevant here.

The commission of a crime is not an essential ingredient in the scheme of barratry. But, of course, if a crime has been committed by the master or crew, that is the best form of proof of barratry because such an act would undoubtedly be prejudicial to the interests of the shipowner. On the other hand, if the act is not criminal in nature, all that is required is that it be 'wilfully' and 'deliberately' committed, and that the shipowner is injured or harmed as a consequence. To avoid such arguments, the word 'wrongful' (and not criminal) was chosen to define barratry in r 11.

It is impossible, not to mention that it would serve no useful purpose, to describe all the various forms of barratrous conduct. For illustration, reference to a few examples would suffice in order that more time may be spent on examining in greater depth the problematic areas of the law such as deviation, scuttling and smuggling.

Running away with the ship and cargo was in the old days a rather common occurrence. In *Falkner v Ritchie*,[97] a partial loss sustained by the shipowner was held to have been caused by barratry when the crew carried the ship away to a distant country, plundered her cargo and deserted her.[98] The most recent case where such an event took place is the *Marstrand Fishing Co Ltd v Beer, The Girl Pat*.[99] Though the act of taking the ship by the master and crew was considered barratrous, the shipowners were, however, unsuccessful in their claim because they were unable to prove that the loss was irretrievable so as to constitute an actual total loss.

In *Havelock v Hancill*,[100] the master and crew, in defiance of their duty, took on board certain commodities which caused the ship to be seized. It was decided that the conduct of the master and crew (committed without the consent of the owner) fell within the general definition of barratry against which the underwriter had agreed to insure. The 'lawful trade' clause was held inapplicable, as it was construed to apply to the adventure or trade in which the shipowners had employed her, and not to the legality of the conduct of the master or crew. The barratrous act of the master did not render the adventure or voyage illegal.[101] Similarly in *Australian Insurance Co v Jackson*,[102] the act of the master in carrying native labourers in his ship without a licence, knowing that it was an illegal act, was held to be barratrous because it was committed without the knowledge of the shipowners.

97 (1814) 2 M & S 290. The loss was not regarded as a total loss so as to give the assured the right of abandonment because she was recaptured and part of the cargo was retrieved.

98 See *Jones v Nicholson* (1854) 10 Exch 28, where the master, who was also part owner, ran away with the ship and cargo. In relation to the other part owners, the master's act constituted barratry.

99 [1937] 1 All ER 158. Further discussed in Chapter 15.

100 (1789) 3 Term Rep 277. By the terms of the policy the ship was insured in any 'lawful trade'.

101 Section 41 relating to the implied warranty of legality refers to the conduct of the assured. In a policy on ship, it is the propriety of the shipowner which is under consideration, not that of the master or crew. See *Toulin v Anderson* (1809) 1 Taunt 227 where trading without licence was held to be a breach of the implied warranty.

102 (1875) 33 LT (NS) 286, PC.

Any act committed by the master and/or crew to defeat the performance of the voyage is barratrous being to the prejudice of his owners. In *Moss v Byrom*,[103] the captain, contrary to the instructions of his owners, took a prize which resulted in the loss of the vessel. The court held that it was an act of barratry even though the prize may have been for the benefit of his owner as well as himself, yet if he acted contrary to his duty to them, it was barratry. The fact that the captain might have conceived that his conduct was to the benefit of his owners is irrelevant. As he had acted contrary to his duty, and his act had in fact increased the risk of the shipowner,[104] the captain was held to have committed a barratrous act.

An intentional breach of a blockade;[105] trading with the enemy;[106] changing sides in a civil war;[107] breach of an embargo;[108] and causing a ship to be captured by a privateer,[109] are a few less well known examples of barratry. The classic examples of barratry, such as a deviation, scuttling, and smuggling, have engendered some interesting points of law and will therefore be given closer attention.

Smuggling

A species of barratry which also constitutes a crime is smuggling. The act of smuggling is, in itself, in a sense, 'harmless' until it comes to the knowledge of the customs authorities which could then cause the ship to be seized. In *Cory v Burr*,[110] the leading authority on the subject, the House of Lords considered two main issues: first, whether the barratrous act of the master or the seizure (by the Spanish revenue officers) was the proximate cause of loss; and secondly, whether the loss fell within the meaning of the word 'seizure' under the 'warranted free from capture and seizure' clause.

Seizure as the proximate cause of loss

It is clear from the remarks made by all the Law Lords that they regarded seizure, not barratry, as the 'proximate' cause of loss.[111] Lord Blackburn justified his stand on the matter with the following explanation:[112]

> '... but the barratry would itself occasion no loss at all to the parties insured. If it had not been that the Spanish revenue officers, doing their duty ... had come and seized the ship, the barratry of the captain ...would have done the assured no harm at all.'

103 (1795) 6 Term Rep 379.

104 Should any loss or accident happen to the ship during that time, his owners would have been responsible for it to the freighters of the ship.

105 *Goldschmidt v Whitemore* (1811) 8 East 126; and *Everth v Hannam* (1815) 2 Marsh R 72; 6 Taunt 375.

106 *Earle v Rowcroft* (1806) 8 East 126.

107 [1958] 2 Lloyd's Rep 578.

108 *Robertson v Ewer* (1786) 1 Term Rep 127.

109 *Arcangelo v Thompson* (1811) 2 Camp 620.

110 (1883) 8 AC 393, HL.

111 For a discussion of the law of causation, see Chapter 8.

112 (1881) 8 AC 393 at p 400.

In similar vein, Lord FitzGerald expressed his views as follows:

> 'Now it is obvious that with so large a definition as that, there may be instances of barratry which may be either harmless or effect but a small loss – for instance a deviation, or wilful delay; but barratry may also consist in a very small matter over which the owners or freighters have no control, the effects or consequences of which may be very serious .... The barratry created a liability to forfeiture or confiscation, but might in itself be quite harmless; but the seizure, which was the effective act towards confiscation, and the direct and immediate cause of the loss, was not because the act of the master was an act of barratry but that it was a violation of the revenue laws of Spain.'[113]

That seizure is to be considered the proximate cause of loss in such circumstances appears to be well accepted. The law as laid down in *Cory v Burr*,[114] has not been overruled; it is thus still good law, and more so when one considers the fact that it emanated from the highest court in the land. Whether the actual decision of the case on the issue of causation would be held differently in the light of the law set out in *The Leyland Case*[115] is doubtful. It is contended that on similar facts the court would probably, for the reasons given above, still regard seizure either as the sole proximate cause or, together with barratry, as another proximate cause of loss.[116]

Warranted free from capture and seizure

As seizure was held the proximate cause of loss, the next question which the House had to decide was whether it fell within the clause which excepted the insurer from liability for seizure. And as the word 'seizure' was interpreted as being wide enough to embrace 'every act of taking forcible possession either by a lawful authority or by overpowering force',[117] the shipowner's claim fell squarely within the exception, and was therefore not recoverable. Needless to say, if barratry had been found to have been the proximate cause of loss, the shipowner would have succeeded in his claim.

It has to be stressed that the fact that the policy in question contained an *express* exception of liability for capture and seizure was critical to the outcome of the case. As seizure was held the proximate cause of loss, the House had no choice but to give legal effect to the express term. In the light of this, the modern equivalent of the 'warranted free from capture and seizure' clause contained in

113 As the case was decided before *The Leyland Case*, the word 'proximate' was not used in the judgments. Under the old law, words such 'immediate' and 'ultimate' were used for the purpose of determining the cause of loss.

114 (1881) 8 AC 393. See also *Lockyer v Offley* (1786), 1 TR 252.

115 (1918) AC 350, HL; discussed in depth in Chapter 7.

116 See Chapter 7.

117 See *Cory v Burr* (1881) 8 AC 393. The definition was later developed in *The Hai Hsuan* [1958] 1 Lloyd's Rep 351 at p 358, by the United States, Court of Appeals, where it was pointed out that: '... "seizure" in a contract of insurance is always to be understood in a restricted and limited sense as signifying only the taking of a ship by the act of governments or other public authority for a violation of the laws of trade or some rule or regulation instituted as a matter of municipal policy, or in consequence of an existing state of war'. That 'seizure' does not include a violent taking of possession of the ship by a mutinous crew was the *ratio decidendi* of the case.

the war exclusion clause of the ITCH(95) and the IVCH(95) has to be considered.

The war exclusion clause of the ITCH(95) and the IVCH(95)

The main objective of the war exclusion clause is, as in the case of the 'free from capture and seizure' warranty, to except an insurer from liability for loss or damage liability or expense caused by 'capture seizure arrest or detainment …'. Barratry and piracy are, however, specifically excluded from the exclusion.

On first reading, this exception within an exception may appear to confer a significant advantage to the assured. The implications of withdrawing barratry and piracy from the 'capture seizure arrest restraint or detainment' exclusion are: first, it confirms that they are not war risks, but marine risks. Secondly, and more importantly, it serves to clarify that, though a loss proximately caused by 'capture seizure arrest retain or detainment' is generally excepted, such a cause of loss resulting from a barratrous (or piratical) act is, however, not to be considered as an excepted loss falling within the scope of the war exclusion. An assured could well be misled by this into thinking that any loss proximately caused by, for example, a barratrous seizure, is recoverable by virtue of the fact that barratry is excepted from the war exclusion. However, further reflection will reveal that this is not the case.

The fact that a loss is not expressly excepted by the policy does not mean that it automatically becomes an included loss.[118] Thus, if seizure, though resulting from a barratrous act, is, as in the case of *Cory v Burr*,[119] held as the sole proximate cause, the loss is still not recoverable – the reason being that a loss proximately caused by seizure, barratrous or hostile, is not an insured risk under the ITCH(95)[120] The withdrawal of barratry (and piracy) out of the war exclusion simply means that a barratrous seizure is not an expressly excluded loss: it does not thereby imply that it has become an included or insured loss.[121]

118 However, in *The Hai Hsuan* [1957] 1 Lloyd's Rep 428, Thomsen CJ in the court of first instance expressed the opinion that if seizure was *not* expressly excluded by the policy the shipowner would be able, provided that barratry was *a* cause of the loss, to recover under the policy. He said: '…where barratry was a cause of loss, if the ultimate cause [eg, stranding or capture] was not excluded from coverage by a warranty or an exclusion clause, recovery might be had on the grounds of barratry, whether or not the ultimate cause was an insured peril; but that where the ultimate cause was excluded, recovery might not be had on the grounds of barratry.' Assuming the word 'ultimate' to mean 'proximate', the judge has given the impression that provided that the proximate cause (seizure) is not expressly excluded, barratry operating even as a remote cause is recoverable; and this is the case whether the proximate cause is or not is an insured peril. With due respect, it is submitted that unless barratry is another proximate cause, it is difficult to see how a remote cause of loss could ever be made recoverable simply because the proximate cause is not expressly excluded. Unless the proximate cause or one of the proximate causes of loss is a peril insured against, it is difficult to see how a loss remotely caused by barratry may be recoverable under the policy. Under common law and s 55(1) of the Act, a remote cause of loss has never been given any legal effect or consequence. Moreover, it is significant to note that s 55(2)(a) excuses the 'misconduct ... of the master or crew' only in cases where the 'loss is proximately caused by a peril insured against'.

119 (1881) 8 AC 393.

120 It is an insured risk under cl 1.2 of the IWSC(H), see Chapter 14.

121 The same applies to piracy.

The barratry exception is thus of limited use. It may be brought into play only in the case where both barratry and seizure are held to be the proximate causes of the loss. In such event, the loss is recoverable for two reasons: first, barratry, one of the proximate causes, is a peril insured against under cl 6.2.4; and secondly, as a barratrous seizure (unlike a hostile seizure) is not an *expressly* excluded loss, there is nothing in the policy to prevent the assured from recovery.[122]

It is significant to note that a barratrous seizure resulting from a breach of a custom regulation is also not covered by the Institute War and Strikes Clauses Hulls (IWSC(H)) falling within the exception of 'any loss damage liability or expense arising … by reason of infringement of any customs or trading regulations' of cl 5.1.4. Thus, if seizure is held as the sole proximate cause, the loss is neither covered by the ITCH(95) nor the IWSC(H). This is a gap which a shipowner has to address; he is in a vulnerable position, for should the barratrous conduct of the master and/or crew cause the ship to be seized by the custom authorities, and seizure be held by the court as the proximate cause of loss, he would not be able to recover for the loss.

The death blow theory

If the seizure of a ship, in consequence of an act of smuggling committed by the master during the currency of the policy, is to take place *after* the expiration of the policy, the loss is not recoverable, regardless of whether the seizure is or is not an insured peril. The authority for this principle is *Lockyer v Offley*[123] where the ship, which was seized 24 hours after the termination of the voyage policy, was held not to be covered by the policy even though such seizure was in consequence of a barratrous act of smuggling committed by the master *during* the insured voyage.

In such a case, one could be tempted to resort to the 'death blow' or 'death wound' theory to argue that as the 'death blow' – that is, the barratrous act of smuggling – was sustained during the currency of the policy, the loss is recoverable.[124] The reply to such a contention is that the 'death blow' (barratry), though inflicted during the currency of the policy, did not cause the 'death': seizure is the proximate cause of loss. The rule that an insurer is not liable for any loss (whether or not caused by an insured peril) which occurs after the risk has terminated has to be strictly adhered to.

Repeated acts of smuggling

The proviso to cl 6.2 of due diligence would now apply to a situation such as that encountered in *Pipon v Cope*[125] to exonerate the insurer from liability. The purpose of the proviso is to ensure that not only the assured, the owners, and managers but also '… *superintendents or any of their onshore management*' have

122 For a discussion of included and excluded losses, see Chapter 8.

123 (1786) 1 TR 259.

124 For a more comprehensive study of the death blow theory, see Chapter 16.

125 (1808) 1 Camp 434.

acted responsibly in the management of the ship.[126] Lord Ellenborough decided that:

> 'It was the plaintiff's duty to have prevented these repeated acts of smuggling by the crew. By his neglecting to do so, and allowing the risk to be so monstrously enhanced, the underwriters are discharged.'

One has, of course, to remember that barratry is, by definition, an act committed *without* the consent or knowledge of the shipowner. Thus, an owner who has condoned repeated acts of smuggling committed by his crew would find it difficult to argue that he has not assented to the risk of the ship being seized. In not taking any action, he is himself guilty of the want of due diligence.

In *Trinder, Anderson & Co v Thames & Mersey Co*,[127] Lord Justice Collins in the Court of Appeal expressed the view that the decision in *Pipon v Cope*[128] can be supported on the grounds that 'the owners who were claiming in respect of loss by seizure for smuggling for the third time in three consecutive voyages must be taken to have *assented* to the barratrous acts of their servants. It was at all events *crassa negligentia aequiparata dolo*.'

Furthermore, in such a circumstance, the proviso has to be read with s 41 in which the implied warranty of legality is qualified with the words 'so far as the assured can control the matter'. A shipowner who is aware of the repeated acts of smuggling committed by his master or crew would find it difficult, if not impossible, to argue that the matter is beyond his control. By condoning the illegal acts of the master or crew it can be said that he has himself carried out the adventure in an unlawful manner.

'Wilfully committed'

To constitute barratry, the act of the master and/or crew has to be 'wilfully' committed. Thus, an act of mere neglect, ignorance, incompetence, or improper treatment, though it tended to the destruction of the vessel, is not barratrous. According to Lord Ellenborough in *Todd v Ritchie*:[129] '… the captain must be proved to have acted against his better judgment …'. The element of 'wilfulness' has to be proved as a part of the plaintiffs' case. There are, however, two groups of cases, namely, those concerning deviation and scuttling, which are particularly useful for the purpose of illustrating this point.

Mere deviation and barratrous deviation

There is a whole ocean between a mere or common deviation and a barratrous deviation. Whether the loss of a ship which has been taken out of her course by the master or crew is to be attributed to barratry is an issue which has arisen on a number of occasions in some of the older cases. A master and/or crew who deliberately carries a ship on a course contrary to the orders of the shipowner

126 Words in italics were recently added to the ITCH(95) and the IVCH(95). Further discussion of the proviso to cl 6.2 of the ITCH(95) and cl 4.2 of the IVCH(95) can be found below.

127 [1898] 2 QB 114 at p 129.

128 (1808) 1 Camp 434.

129 (1816) 1 Stark 240.

clearly commits a barratrous act: he has intentionally committed a breach of duty.

In *Ross v Hunter*,[130] Mr Justice Buller said that, 'in one sense of the word, it is a deviation by the captain for fraudulent purposes of his own; and that is the distinction between deviation, as it is generally used, and barratry'. For deviation to amount to barratry the master or crew has to deviate with a fraudulent intent. The ship must be taken out of its direct or normal course 'for the purpose of his own private advantage, and ... for a fraudulent purpose …'.[131] There must be a barratrous intention.[132]

Similarly in *Mentz, Decker & Co v Maritime Insurance Co Ltd*,[133] the master in breach of his orders and for his own private benefit took the ship on two occasions several hundred miles out of its course. Whilst trading at one of the port she stranded and became a total loss. These acts of deviation were held by the court to be barratrous.

The circumstances of the above two cases have to be compared with those in *Phyn v The Royal Exchange Assurance*,[134] where the vessel was carried out of its course by strong currents, and was later captured and condemned as prize. As there was no evidence of criminal intent, fraud or criminality, the deviation was held not to be barratrous. More importantly, the act was clearly not 'wilfully' committed, as the sea was responsible for her change of course.

If a ship has to return to port because of her unseaworthy condition, such a deviation does not constitute barratry.[135] The act of the captain being necessary for reasons of safety was not only not barratrous but was also justifiable.[136] It would appear that 'unless they be accompanied with fraud, or crime no case of deviation will fall within the true definition of barratry.'

Barratrous scuttling

Scuttling a ship is a deliberate and an intentional act; proof of the wilful casting away of a ship, whether committed with or without the connivance of the

130 (1790) 4 Term Rep 33.

131 *Ibid*, at p 37.

132 In *Stamma v Brown* (1742) 2 Stra 1173, the conduct of the master in calling at a port out of the direct route, in order to deliver cargo, was held to be a mere act of deviation and not barratry. The court found that his conduct was not inconsistent with his duty to his owners, but was in fact for their benefit. In a very old and peculiar case, *Elton v Brogden* (1747) 2 Str 1264, the act of the crew in forcing the master to go out of the course of the voyage was held to be neither a deviation nor barratry: it was not deviation by reason of the excuse of necessity; and it did not amount to barratry as the ship was not run away with in order to defraud the owners. The plaintiffs were awarded the sum insured, presumably, because she was captured.

133 [1910] 1 KB 133; (1909) 101 LT 808. The central issue of the case was whether the notice given by the assured, after he became aware of the loss, was sufficient to satisfy the held covered clause.

134 (1798) 7 Term Rep 505.

135 See *Hibbert v Martin* (1808) 1 Camp 538.

136 See s 49(1)(d). In the law relating to carriage of goods by sea, see *Kish v Taylor* [1912] AC 604, HL.

shipowner, would negative a loss by a peril of the seas which is an accidental and fortuitous loss.[137] The concepts are mutually exclusive.

Whether a loss can be said to have been attributed to barratry is dependent upon whether it has been wilfully or deliberately committed by the master and/or crew. Once that has been ascertained, the next question which arises for consideration is whether the shipowner is privy to the act of the master or crew which caused the sinking of the ship. If the shipowner was privy or had procured to the sinking of the ship, then the wilful misconduct of the shipowner, and not barratry, would be regarded as the cause of loss.

That the plaintiffs have to bear the burden of proving that the act of the master or crew was deliberate is not in dispute.[138] But the question as to which party has to prove the issue of privity or consent, that the shipowner was or was not privy to the acts of the master or crew, is not so easy to answer. This problem can be more conveniently discussed elsewhere.[139]

To the prejudice of the shipowner

Barratry is by definition an act committed by the master or crew to the prejudice of the shipowner. This necessarily means that if a shipowner consents or is privy to the barratrous act, he would not be in a position to claim that he has been prejudiced. This aspect of the law has been settled beyond doubt by the classic authorities of *Vallejo v Wheeler*[140] and *Nutt & Others v Bourdieu*[141] In the latter case, Lord Mansfield had to decide on the vital issue as to whether barratry can be committed against any but the owner/owners of a ship. His opinion which has never been challenged reads as follows:

> 'It is clear beyond contradiction that it cannot. For barratry is something contrary to the duty of the master and mariners, the very terms of which imply that it must be in the relation in which they stand to the owners of the ship … The point is too clear to require any further discussion.'

In spite of the clarity and firmness of this statement, the matter was again raised in *Soares v Thornton*[142] only to be reaffirmed by the court with the following remark: ' … the very definition of barratry is a fraud by the master and mariners against the owner of the ship'. In *Elfie A Issaias v Marine Insurance Co Ltd*,[143] the Master of the Rolls issued the reminder that '… to cast away a man's ship without his consent is 'to his prejudice' although the pecuniary effect may be to his advantage'.

137 That scuttling is not a peril of the seas is discussed in Chapter 9.

138 See eg, *The Michael* [1979] 1 Lloyd's Rep 55 at p 66, QBD.

139 See Chapter 11.

140 (1774) 1 Cowp 143. Lord Mansfield said that '... if the owner of a ship insures and brings an action on the policy, he can never set up as a crime a thing done by his own direction or consent'.

141 (1786) 1 Term Rep 323.

142 (1817) 7 Taunt 627 at p 639.

143 (1923) 15 Ll L Rep 186 at p 189, CA.

Nothing can be clearer than these statements. However, if more recent authority be required, the case of *Samuel v Dumas*[144] could be cited, as Lord Sumner has stressed that, 'it is of the very essence of barratry that the shipowner is wronged, and he is not wronged when he consents'. Subsequently, Mr Justice Kerr in the court of first instance in *The Michael*[145] reiterated the rule as follows:

> '... "to the prejudice of the owner" means, in effect, without his consent, or, to use an expression which is sometimes used in other contexts, "without his privity" … It is clear that consent or privity can range from active complicity to mere passive concurrence.'

The most complete and succinct recent account of barratry, however, was delivered by Mr Justice Mustill (as he then was) in the court of first instance in *The Salem:*[146]

> 'It is not enough to show fraudulent conduct by the master and crew directed against the interests of the person insured. Barratry necessarily involves a damnification of the shipowner whether he or someone else is the person insured under the policy … It follows that if the shipowner is privy to the dishonesty of the crew, there can be no recovery under a policy on either ship or goods. Under a hull policy the assured fails for two reasons: (a) because the loss is not by barratry, since the act is not contrary to his interests, and (b) because he cannot recover for the consequence of his own wrongful act.'[147]

As the above cases have demonstrated, the absence of consent or privity on the part of the shipowner is an essential ingredient of the peril of barratry. The prickly question is: which party has to prove this fact? Is it for the plaintiffs to prove the absence, or the defendants to prove the presence, of privity? This difficult but interesting question involving the burden and standard of proof is discussed elsewhere.[148]

The owner

The word 'owner' appearing in r 11, though unqualified, is traditionally understood in the context of barratry to mean the *shipowner*. It is indeed regrettable that the word 'ship' is not inserted before the word 'owner' as this would dispel all doubts, particularly, as to whether a cargo owner who has been prejudiced by the act of the master or crew could successfully claim for barratry. But read as a whole and in conjunction with the words 'or, as the case may be, the charterer,' the implication that it refers only to a shipowner, and not a cargo owner, is clear. Moreover, the above cases have clarified this point beyond doubt.

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144 [1924] AC 431 at p 463, HL. Even though he was the dissenting judge, Lord Sumner's opinion on this particular issue is nevertheless relevant. See also *Rickards v Forestal Land, Timber and Railways Co Ltd* [1941] 3 All ER 62, HL where the issue as to whether barratry could be committed against a cargo owner was again resurrected only to be quashed. As barratry is no longer a peril insured against under the ICC (B) & (C), the question is now academic.

145 [1979] 1 Lloyd's Rep 55 at p 67.

146 [1981] 2 Lloyd's Rep 316 at p 324, QBD.

147 Under a policy on goods the assured fails for the single reason that there is no loss by barratry.

148 See Chapter 11.

Owner of a chartered ship

A shipowner who has let out his ship on charter continues to have an insurable interest in her, even though the charterparty may contain a term to the effect that the charterer shall compensate the owner for any loss or damage sustained to the ship. He is not bound to 'trust exclusively to the credit of the charterer, but might likewise protect himself by a policy of insurance'.[149]

It would seem that if a wrongful act was committed under the direction of the charterer, the shipowner would also be prevented from claiming for the loss by barratry.[150] According to Lord Ellenborough in *Hobbs v Hannam*,[151] applying the law of agency, the reasoning is as follows:

> 'If I give the dominion of my ship to a charterer, his acts are my acts: and in this case Kendal [the charterer] whose orders the master implicitly obeyed, according to his instructions, was, in point of law, the agent of the plaintiff. Therefore, the loss arose from following his own orders; and there is no pretence for imputing it to barratry.'

Master a part-owner

That a master who is the sole owner of a ship cannot commit barratry is obvious: a man cannot commit a fraud against himself. There is, however, no reason why an innocent part-owner should not be allowed to claim under a policy – the act of the master (another part-owner) is in relation to him barratrous.

In *Jones v Nicholson*[152] it was held that 'if the master, being himself a part-owner, commits the barratry, that is equally a fraud upon the other part-owners'. The reasoning lies in the rhetoric: are the other owners the less injured because the master happens to be a part owner? There is, *vis-à-vis* the other owners, equally a fraudulent act in violation of his duty as master. The prejudice lies in the fact that his act renders the owners liable to the charterers for a breach of contract. Thus, barratry can be committed by a master who is also a part-owner of the ship.[153]

The demise charterer

The words 'or, as the case may be, the charterer' have been added to protect the position of a person who is, for all intents and purposes, the owner of the ship at the relevant time. A demise charterer is such a person, for he is by reason of his contractual relationship with the shipowner in possession and control of the ship.[154] This is well established in the law relating to charterparties, and in

149 *Per* Lord Ellenborough in *Hobbs v Hannam* (1811) 3 Camp 93. See also s 14(3).

150 The charterer himself would not be to claim under a policy, as he cannot complain of a wrong which he himself has ordered for its commission.

151 (1811) 3 Camp 93 at 95. In this case, the charterer himself had sent smuggled goods on board the ship for which she was seized by the authorities. The master was required by the shipowner to implicitly obey the orders of the charterer. Thus, the master in obeying the charterer's orders were in effect obeying the shipowner's orders.

152 (1854) 10 Exch 28 at p 38, *per* Alderson B.

153 See *Westport Coal Co v McPhail* [1898] 2 QB 130 CA for a dispute on the same point in the law of carriage of goods.

154 *Colvin & Others v Newberry & Benson* (1828) 8 B & C 166.

marine insurance the issue was first raised in 1774 in *Vallejo v Wheeler*.[155] The master, for his own convenience, took the ship out of her course in order to load a cargo of brandy and wine for his own account. The goods on board the ship, which were damaged as a result of this iniquitous scheme of the master, belonged to a freighter; his action was on a policy upon goods, and the legal issue raised was whether a barratrous act had been committed against him. It was argued that the deviation being with the knowledge of the shipowner could never be barratrous.

The court held that as the assured was the owner of the goods, as well as temporary owner of the ship, the act of the master was barratrous. The assured was regarded as owner *pro hac vice*, and in the light of this the conduct of the master was clearly barratrous.

It would seem that even if the original owner was privy to the wrongful act committed by the master or crew, it would nonetheless constitute barratry *vis-à-vis* the demise charterer, as he is *pro tempore* the owner of the ship. The position was explained in *Soares and Another v Thornton*[156] as follows:

> 'Then the act of the original owner and master together was a complete act of barratry. If the right of the original owner was then at an end, the right of the freighter must be in existence. The concurrence of the freighter was then the only thing that would prevent the act of the master from being an act of barratry.'

Provided that the demise charterer himself is not privy to the act of the master, he would be able to claim for a loss by barratry.

In *The Salem*,[157] Mr Justice Mustill observed that, 'owner ship of a vessel may be divisible, and that the proprietors of the hull may charter it out on terms which give the charterer a right of control sufficient to put him in the same position, for many purposes, as if for the time being he were himself the shipowner'.

A charterer who is not in possession or control of the ship would not be able to claim the status of owner *pro hac vice* or owner *pro tempore*, and as such is in the same position as a mere shipper of cargo discussed below.[158]

The cargo owner

It is significant to note that the above and older cargo-claim cases[159] would now have to be read with caution, as the legal principles proposed in them are only relevant to a policy in which 'barratry' is a peril insured against.[160] Obviously,

155 (1774) 1 Cowp 143.

156 (1817) 7 Taunt 627 at p 639.

157 [1981] 2 Lloyd's Rep 316 at 324, QBD.

158 For a fuller account of the law relating to a demise charter, see Mustill J's judgment in *The Salem* [1981] 2 Lloyd's Rep 316 at p 324, QBD.

159 Eg, *Stamma v Brown* (1742) 2 Stra 1173; *Vallejo v Wheeler* (1774) 1 Cowp 143; *Nutt v Bourdieu* (1786) 1 TR 323; *Ross v Hunter* (1790) 4 Term Rep 33; *Goldschmidt v Whitmore* (1811) 3 Taunt 508; *Soares v Thornton* (1817) 7 Taunt 627; and *Dixon v Reid* (1882) 5 B & Ald 597.

160 In the more recent cases of *Rickards v Forestal Land, Timber and Rlys Co Ltd* [1940] 4 All ER 96; [1941] KB 225 CA; [1941] 3 All ER 62, HL; *Commercial Trading Co v Hartford Fire Insurance* [1974] 1 Lloyd's Rep 179; and *The Salem* [1983] 1 Lloyd's Rep 316, HL, the cargo was insured under the old Lloyd's form where barratry was specifically named as an insured peril.

only if barratry is an insured peril is the conduct of the master or crew relevant for the purpose of determining whether it falls within the legal definition of the term. The older cases have, however, established that even in a cargo policy, the act committed by the master or crew must be against the *shipowner*, or, as the case may be, the charterer.[161] The fact that it was directed against the interests of, or was done in bad faith towards, only the cargo owners is not sufficient to render the act barratrous. This means that if the loss was assented to by the shipowner, the cargo owner would not be able to recover for barratry.[162] Such issues are now academic, as barratry is not only not an insured peril under the ICC (B) and (C), but it is also specifically excluded by the general exclusions clause, cl 4.7, excepting cover for 'deliberate damage to or deliberate destruction of the subject-matter insured or any part thereof by the wrongful act of any person or persons'.

A barratrous act would fall within the coverage of the ICC (A) by reason of the fact that the policy is for all risks, and barratry is not specifically excluded by the general exclusions clause. Under the scheme of an all risks policy, the assured does not have to prove the ingredients of barratry, but merely that the loss was fortuitous. Provided that the event which caused the loss was a risk,[163] and does not fall within one of the enumerated exclusions, the loss is recoverable.

The innocent mortgagee

The question of whether an innocent mortgagee may recover for a loss caused by barratry was examined by the Court of Appeal in *Small v United Kingdom Marine Mutual Insurance Association*.[164] The facts of the case are as follows. Using the ship as security, one Wilkes, a part-owner and master of the ship, borrowed a sum of money from Small. The ship was wilfully cast away by Wilkes, and the plaintiffs, who were the executors of Small, instituted an action (not as assignee) on a policy which had been subscribed on Small's behalf. Perils of the seas[165] and, alternatively, barratry were alleged as the causes of loss. The issue was

161 The legal principle first enunciated by Lord Mansfield in *Nutt v Bourdieu* (1786) 1 TR 323 at p 330, that barratry cannot be 'committed against any but the owners of the ship' could, if read out of context, be misleading. On first reading, it could give the impression that a cargo owner can never claim for a loss by barratry. But read in its proper context, it is clear that a cargo owner can succeed in his claim for barratry if it is proved that the act of the master or crew was committed against the interests of the shipowner. If only the interests of the cargo owner is prejudiced, then the act does not fall within the definition of barratry. Naturally, such an issue can only arise if barratry is an insured peril under the policy in question.

162 The clearest explanation for this rule is Lord Sumner's statement made in the House of Lords in *Samuel v Dumas* [1924] AC 431 at p 463, HL, which read as follows: '... there is very old authority for saying that cargo owners cannot recover as for barratry, when the barratrous act leading to the loss was *assented to by the shipowner*, for it is of the essence of barratry that the shipowner is wronged, and he is not wronged, when he consents …'. In *The Salem* [1983] 1 Lloyd's Rep 342, the House of Lords held that as the master and crew were acting in conspiracy with the shipowner, their conduct was not barratrous.

163 See *British & Foreign Marine Insurance Co v Gaunt* [1920] 1 KB 903; [1921] 2 AC 41, HL.

164 [1897] 2 QB 311, CA, hereinafter referred to as *The Small Case*.

165 The law on perils of the seas and scuttling is examined in Chapter 9.

whether the act of Wilkes was in relation to Small, who was not a part-owner of the ship but a mortgagee, barratrous in nature.[166]

The Court of Appeal held that as Small 'took part in placing Wilkes in the position of captain'. Wilkes was to be regarded as the master for Small and the other part-owners. On this footing, the loss was held to be covered by the policy. Small, though not a part-owner, was nonetheless treated as one for the purpose of enabling him to recover for the loss on the ground of barratry. It would appear that the court, in its desire to allow the innocent mortgagee the right to recover under the hull policy, has, it is submitted, relied on a rather tenuous ground to support its decision. The court's interpretation of the facts is somewhat artificial and contrived, and therefore difficult to accept.

As was seen, case law and rule 11 have defined that to constitute 'barratry', the wilful act of the master or crew has to be committed to the prejudice of the owner or owner *pro hac vice*. Except for having a say in the appointment of Wilkes, Small's position did not in any other way resemble that of an owner or of a charterer by demise, who by reason of being in possession and control of the ship is for all intents and purposes the owner *pro hac vice*. The court should have taken into consideration the fact that Small did not employ Wilkes or pay his salary. Surely, simply being involved in the appointment of the master is not, in itself, sufficient to make Small owner or owner *pro hac vice* of the ship.

Howbeit, it is submitted that there was really no need for the court to make believe that Small was a part owner merely because he was able, as a condition of the loan, to insist that Wilkes be made master. The court could have arrived at the same decision by examining the definition of barratry. The law (common and statutory) does not say that to constitute barratry the act has to be committed to the prejudice of the *assured* who, in this case, were the mortgagees.[167] Lord Justice Smith acknowledged the fact that 'the act of Wilkes was barratrous as against Small just as it was against the co-owners'. Thus, it could be argued that, as Wilkes's conduct was barratrous *vis-à-vis* the other part owners, the legal requirement – 'to the prejudice of the owner'– was satisfied.

Once it is proved that the shipowners are in fact prejudiced, barratry is proved to have been committed. There is nothing in law to say that the wilful act has to be committed to the prejudice of the *assured*, whether he be a mortgagee or a cargo owner.[168]

To protect his interest fully, a mortgagee would be well-advised to take out the Institute Mortgagees Interest Clauses (Hulls).[169] It would be highly dangerous for him to rely solely on the precarious ground upon which of *The Small Case* was founded, as it could be overruled.

166 The House of Lords in *Samuel v Dumas* [1924] AC 431 has overruled the Court of Appeal's decision in *The Small Case* (1897) 2 QB 311, CA, on the claim based perils of the sea, but has left its ruling based on barratry undisturbed. As such, the judgment on barratry still stands as good law. For a discussion on *The Small Case* in relation to perils of the sea, see Chapter 9.

167 Since the assured has suffered a loss, he would also, of course, be prejudiced by the barratrous act.

168 This is the legal position in relation to cargo.

169 See cl 6.1.2 of the Institute Mortgagees Interest Clauses: see Appendix 23.

CONTACT WITH AIRCRAFT, HELICOPTER OR SIMILAR OBJECTS, OR OBJECTS FALLING THEREFROM

With the exception of the new addition of 'helicopter', cl 6.2.5 of the ITCH(95) was previously a part of a larger clause which included 'land conveyance, dock or harbour equipment or installation'.[170] This latter part of the clause remains in cl 6.1.6 of the ITCH(95) which is not subject to the due diligence proviso, whereas the above peril, having been moved from cl 6.1 to 6.2 is now subject to the proviso.

The first 'objects' must presumably be read *ejusdem generis* with aircraft and helicopter to include flying objects and machines such as air ships and satellites.[171] They obviously refer to civilian aircraft; but whether they also include military aircraft causing damage whilst performing military exercises is unclear. Provided that the loss does not fall within the scope of the war exclusion clause of the ITCH(95), there is no reason why such a loss should not be recoverable.

The second 'objects' refer to anything, for example, bombs, rockets, missiles, and satellites, falling from these flying objects.[172]

THE DUE DILIGENCE PROVISO

Any claim based on cl 6.2 of the ITCH(95) is subject to what is commonly referred to as the due diligence proviso, which is now worded as follows:

> 'provided such loss or damage has not resulted from want of due diligence by the Assured, Owners, Mangers or *Superintendents or any of their onshore management*.'[173]

There are two main problems which are likely to arise from this proviso: the first is in connection with the question of onus of proof, and the second in relation to the words 'resulted from'. Before preceding to examine these issues and the nature of the proviso, it is convenient first to consider the notion of due diligence.

Want of due diligence

The concept of due diligence is borrowed from art 3 r 1 of the Carriage of Goods by Sea Act 1971 where the term, which has been subjected to a considerable amount of judicial scrutiny, has acquired a rather specific meaning in law.[174]

170 Previously cl 6.1.7 of the ITCH(83) which is identical to cl 4.1.7 of the IVCH(83).

171 Whether a hot-air balloon is a 'similar object' is an interesting thought.

172 Whether substances such oil and chemicals falling from aircraft are 'objects' is unclear.

173 The words in italics have been added by the ITCH(95).

174 The failure to exercise due diligence under art 3, r 1 of the Carriage of Goods by Sea Act 1971 was construed in *Riverstone Meat Co Pty v Lancashire Shipping Co Ltd* [1961] 1 All ER 496 as non-delegable: the carrier was held liable by the House of Lords even for the negligence of the servants of a reputable firm of ship repairers.

Whether the same meaning is to be awarded to the term in the law of marine insurance has yet to be considered by the courts. The proviso could be interpreted to mean that only the *personal* want of due diligence of the 'owners, managers or superintendents or any of their onshore management' would prejudice the claim of the assured. In other words, only if any one of these persons is *personally* guilty of the want due diligence would the claim be irrecoverable. On the other hand, it could also be given a wider construction, as in the law of carriage of goods by sea, to include the want of due diligence on the part of the subordinates, employees, servants and agents of the 'assured, owners, mangers or superintendents or any of their onshore management'. It has been pointed out that in the United States, the rule of the *personal* want of due diligence is applied; and should the point arise in this country, the same is likely to be adopted.[175] As a list of persons is specified in the proviso, this assumption is probably correct.[176]

In *The Brentwood*,[177] the Court of Appeal held that as the plaintiffs, the assured, had failed to provide the master with the necessary standing instructions concerning minimum freeboard, they were guilty of the want of due diligence under the proviso. The exercise of due diligence means the exercise of due care and attention.[178]

Assured, owners, managers or superintendents or any of their onshore management

The proviso refers to the want of due diligence by the 'assured, owners, managers or superintendents or any of their onshore management'. The want of due diligence of any *one* of these persons would defeat the claim of the assured. A mortgagee, for example, whether suing as an assignee or as an original assured of a hull policy, who is himself free from blame, could well lose his right to indemnity under the policy should any one of these persons be found guilty of the want of due diligence. Thus, it is not sufficient merely to show that the assured themselves are free from blame, for the want of due diligence committed by any *one* of these listed persons would forfeit their right to recovery. The objective of the proviso is to ensure that members of the higher level of the corporate ladder are themselves vigilant and free from blame in the carrying out of their duties in the management of the vessel.

175 See Arnould, para 832.

176 If the intention of the clause was to include the want of due diligence of servants and agents, it could have easily added the words 'and of their servants and agents' at the end of the clause.

177 *Coast Ferries Ltd v Century Insurance Co of Canada* [1973] 2 Lloyd's Rep 232.

178 The test of culpable negligence, gross negligence or culpable inattention as propounded in earlier cases such as *Toulmin v Inglis* (1808) 1 Camp 421, and *Pipon v Cope* (1808) 1 Camp 434, cannot now be good law.

Proof of breach of proviso

Arnould,[179] relying on a rather tenuous statement made by the court of first instance in *The Brentwood*,[180] states that it is the assured who has to prove that the requirement of the proviso is satisfied. The opposite view, however, can be found in O'May, where it is also said that one should not be too perturbed with this issue as, for want of a better expression, it will all in the end come out in the wash with discovery and exchange of pleadings.[181] With due respect, it is submitted that the question of burden of proof is a matter of great tactical importance, especially in the light of the fact that a judge could dismiss a case purely on the ground of the plaintiffs having failed to prove their case. We were recently reminded by the House of Lords in *The Popi M*[182] of the principle that if the party upon whom the burden of proof lies in relation to any averment is unable to discharge that burden, the plaintiffs' case would be dismissed. If the persuasive burden lies with the assured, it is for them to discharge that burden; and not for the underwriters to prove or show how the loss occurred. It is contended that whether the burden of proof lies with the assured or with the underwriters is largely dependent upon how one regards the terms of the proviso: Is it a condition of the claim or is it a defence?

A condition or a defence?

The due diligence requirement of cl 6.2 could be seen either as an integral part or an ingredient of the assured's claim, or as providing the underwriters with a defence to the assured's claim. The question as to which party is to bear the initial burden of proof is critically dependent upon how the proviso is construed. If the exercise of due diligence is considered as a *component* of the assured's claim, then it is for them to satisfy the court that it has been complied with. On the other hand, if it is regarded as providing the underwriters with a defence to the claim of the assured, then, it would have to be proved by the underwriters.[183]

If the onus originally falls with the assured, their failure to prove the exercise of due diligence would naturally result in a failure on their part to prove their case. Having failed to prove an essential requirement of the claim, this would necessarily mean that there would be no case for the defence to answer. But should the initial burden lie with the underwriters, then all that the assured need prove as their case are the ingredients of the insured peril which they have alleged has proximately caused the loss. In practice, it is generally accepted as providing a defence to the underwriters; as such, it is expected of

179 Arnould, para 832.

180 [1973] 2 Lloyd's Rep 232. The Canadian Court of Appeal has conveniently left the matter open.

181 O'May, p 138.

182 *Rhesa Shipping Co SA v Edmunds* [1985] 2 Lloyd's Rep 1, HL. See Chapter 11.

183 As was seen, the same problem arises in the law of barratry: is it for the assured to prove the absence of connivance, or for the underwriters to prove that the assured had consented to the loss? See Chapter 11.

them to prove the want of due diligence, not for the assured to prove they were not guilty of the want of due diligence.

Clause 6.2 of the ITCH(95) has not only failed to clarify where the burden of proof lies,[184] but also whether the rule of proximate cause applies.

'Resulted from'

The introductory words to cl 6.2 (and 6.1) of the ITCH(95) use the term 'caused by' which, as was seen earlier, has always been understood to mean 'proximately' caused by. The proviso to the clause, however, uses the expression 'resulted from'. Whether the rule of proximate cause is to be applied to this term has yet to be considered by a court of law.

It is, however, the view of one author that,[185] 'The words "resulted from" are the equivalent of "proximately caused by"'. Whether the rule of proximate cause should be applied to the proviso is, it is submitted, doubtful. The rule of proximate cause, as laid down by s 55(1), is applicable, as can be seen by its wording, *only as regards a loss caused by a peril insured against*. Construed as a defence, its function is to *disentitle* the assured of the right to indemnity for a loss which is *prima facie* recoverable by reason of being *proximately* caused by one of the perils enumerated in cl 6.2. There is no reason why the underwriters should be required to prove the more onerous burden, that the loss was proximately caused by the want of due diligence. Used as a defence he need only adduce sufficient proof (as a remote cause) to cast a doubt upon the case of the assured. It is submitted that the words 'resulted from' must refer to the want of due diligence (by any of the persons named) as a remote cause of the loss, and should be construed as having the same legal effect as the term 'attributable to' appearing in ss 39(5) and 55(2)(a) of the Act, as discussed earlier.[186]

184 The matter was apparently considered when the proposals for the amendment to the proviso to cl 6.2 of the ITCH(95) were recently debated. It was, however, decided not to disturb the *status quo*, whatever that might be.

185 O'May, p 137. It would appear that in holding the view that it is the insurer who has to prove that the loss is 'proximately' caused by the want of due diligence under the terms of the proviso. O'May is in fact going against the grain of his own interpretation of the proviso to the effect that it provides a defence to the claim of the assured.

186 See Chapter 11.